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NO. 83-113

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LOUIE L. WAINWRIGHT,

PETITIONER,

V.

CHARLES W. PROFFITT,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certiorari should be granted to review the holding of the court below that a capital defendant has a limited right to cross-examine the preparer of a psychiatric report, when that holding was expressly limited to the facts of this case -- i.e., a case where the trial court relied on a court-appointed psychiatrist's written report which expressed an adverse expert opinion based on materially inaccurate information and ignorance of crucial facts, where defense counsel specifically requested and was assured that he would be allowed to cross-examine the doctor, and where the doctor conceded on habeas that his opinion would have been affected had he been confronted with the true facts?

2. Whether certiorari should be granted to review an alternative holding in the decision below unnecessary to the outcome of the case -- i.e., that a federal habeas court may not rely on a state trial court's disclaimer regarding consideration of evidence, when the court held that even if such a disclaimer may be considered, there was, in fact, no such disclaimer in this case?

3. Whether certiorari should be granted to determine whether an attorney -- without the knowledge or consultation of the defendant -- can waive the defendant's right to be present during the introduction of adverse psychiatric testimony at a capital sentencing proceeding?

4./5. Whether certiorari should be granted to review portions of the opinion below which were specifically remanded to the district court for reconsideration in light of this Court's recent decision in Barclay v. Florida, ___ U.S. ___, 51 U.S.L.W. 5206 (July 6, 1983)?

6. Whether certiorari should be granted to review the standard for the grant of habeas corpus relief when this case meets the standard suggested by petitioner to be appropriate, and where the issue was not raised by petitioner until rehearing or decided by the court below?

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STATEMENT OF THE CASE

The relevant facts and procedural history of the case are sufficiently set forth in the opinion of the court of appeals, as reproduced in the appendix to the petition for writ of certiorari at A-1.

REASONS FOR DENYING THE WRIT

Although petitioner presents six questions for review by this Court, none of the questions proposed addresses an actual holding by the court of appeals determinative of the judgment below. Questions 1 and 3 seek review of aspects of the lower court's holding expressly modified on rehearing or inaccurately characterized by petitioner. Question 2 requests this Court to review an alternative holding of the lower court unnecessary to the court's decision. Questions 4 and 5 ask this Court to review a holding remanded on rehearing to the district court for reconsideration in light of a recent decision of this Court. Finally, Question 6 attempts to litigate in this Court a broad challenge to the scope of federal habeas corpus never fairly presented below or considered by the court of appeals in deciding respondent's case.

As shall be discussed below, the two issues on which the lower court granted relief involve factual circumstances unique to respondent's case and holdings carefully restricted to the particular facts presented. Thus, the court of appeals held that a capital defendant may not be denied the right to confront and cross-examine a court-appointed psychiatrist whose conclusions are relied upon by the trial court to impose a sentence of death, where the conclusions are based on inaccurate and incomplete information, where the defendant was assured he

would be allowed to cross-examine the psychiatrist, and where a specific request was made for such cross-examination. The court further held that a capital defendant may not be denied the right to be present at a sentencing proceeding at which psychiatric testimony against him is received, without a knowing and voluntary waiver by him of his right to be present.

Neither holding by the court of appeals merits review by this Court. The facts establishing each constitutional violation are firmly supported, and the rulings below not only do not conflict with any decision of this Court or any other court, but, indeed, are fully consistent with this Court's opinions concerning the constitutional safeguards for capital sentencing proceedings, especially those involving psychiatric evidence. See e.g., Barefoot v. Estelle, ___ U.S. ___, 51 U.S.L.W. 5189, 5194 (July 6, 1983); Estelle v. Smith, 451 U.S. 454 (1981); Gardner v. Florida, 430 U.S. 349 (1977).

Finally, certiorari is especially inappropriate given the procedural posture of this case. In order for this Court's review to have any impact on the ultimate outcome of this case, the Court would not only have to reverse the two rulings of the court of appeals mentioned above, but would have to decide adversely to petitioner an additional issue remanded to the district court for determination there,[1] and one issue not

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1. Petitioner inexplicably fails to advise the Court that upon rehearing the court of appeals remanded portions of its holding (addressed in questions 4 and 5 of the petition) to the district court for reconsideration in light of Barclay v. Florida, ___ U.S. ___, 51 U.S.L.W. 5206 (July 6, 1983). See Proffitt v. Wainwright, 706 F.2d 311, 312 (11th Cir. 1983); A-221.

reached by the court below.[2]

For all these reasons, the petition for writ of certiorari should be denied.

A brief response to each of petitioner's six questions follows.

QUESTION ONE

The Court of Appeals Properly Held That on the Facts of This Case, Respondent Was Denied His Right to Cross-Examine Dr. Sprehe.

Contrary to petitioner's contention in Question No. 1, the court of appeals did not extend the right of confrontation to the cross-examination of the author of a psychiatric report that was neither disputed by respondent nor considered by the state trial court in imposing sentence. Respondent, from the outset, sought cross-examination of Dr. Sprehe on the contents of his report. The court of appeals held that respondent had specifically requested an opportunity to examine Dr. Sprehe prior to imposition of sentence, id. at 1250; A-117, and had been expressly assured that Dr. Sprehe would be made available for cross-examination. Id. When finally afforded such cross-examination at the habeas hearing respondent proved, as the court of appeals held, that Sprehe was unaware of crucial facts relevant to his opinions. Proffitt v. Wainwright, 685 F.2d 1227, 1260 (11th Cir. 1983), A-163. Respondent also proved, through undisputed documentary evidence, that Sprehe was wholly misinformed about respondent's prior criminal record

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2. See Proffitt v. Wainwright, 685 F.2d 1227, 1269 (11th Cir. 1983); A-205. Two issues resolved against respondent are also challenged in a cross-petition for writ of certiorari filed contemporaneously herewith.

and conduct, erroneously reporting that respondent had a prior record of violent crimes and behavior.

The court of appeals also expressly found that the state trial judge relied upon Sprehe's report in imposing sentence. The court rejected, as "clearly erroneous," petitioner's contention to the contrary. Id. at 1255; A-140-41. See discussion, infra, pp. 8-9.

The facts supporting the court of appeals' holding are clear. After hearing testimony in the sentencing proceeding from a jail physician that respondent suffered from a curable mental or emotional disturbance sufficient to support the finding of two statutory mitigating circumstances, the trial judge ordered two psychiatric examinations to be performed either to confirm or negate the presence of the mitigating circumstances. Proffitt v. Wainwright, supra, 685 F.2d at 1250; A-115. Doctors Coffer and Sprehe examined respondent and submitted reports in which they presented their professional opinions that respondent was not mentally disturbed. Id.; A-115-16.

At the time the psychiatrists were appointed, a hearing was set at which the doctors were to testify and submit themselves to cross-examination. Id.; A-116. Dr. Coffer appeared and testified, but Dr. Sprehe did not. Id.; A-116-17. Counsel for respondent requested the opportunity to cross-examine Dr. Sprehe and was told by the trial judge he would be given the opportunity. Id.; A-117. However, immediately thereafter, notwithstanding counsel's repeated requests to cross-examine the doctor, the trial judge brought the respondent before him and sentenced him to death. Id.

The trial court stated on the record at the time of sentencing that he had read Dr. Sprehe's report and ordered it

included in the court file. In sentencing respondent to death, the trial judge characterized respondent as prone to violent behavior, Proffitt v. State, 315 So.2d 461, 466 (Fla. 1975), a finding apparently drawn in substantial part from Dr. Sprehe's inaccurate description of respondent's history as containing violent behavior. The trial court further found, in contradiction to the jail physician's testimony but consistent with Dr. Sprehe's report, that respondent suffered from no mental disturbance which would serve to mitigate his punishment. Id. at 466, 467.

When finally given the opportunity to cross-examine Dr. Sprehe at the habeas hearing, respondent was able to establish that Dr. Sprehe was unaware of critical information relevant to petitioner's mental condition and had, moreover, relied on inaccurate information in formulating his opinion. Proffitt v. Wainwright, supra, 685 F.2d at 1260; A-163. Thus, Dr. Sprehe conceded at the hearing that he was unaware at the time of his examination (1) that respondent was medicated with an anti-psychotic drug that suppressed symptoms of mental illness (Habeas Hearing Transcript [hereinafter "H.T."] 125); (2) that respondent had engaged in several physically self-destructive acts while in jail and was being held without clothes as a precaution against further such acts (H.T. 124-25); and (3) that respondent had invented a history of prior violent and criminal behavior that was wholly untrue (H.T. 127-29). Dr. Sprehe admitted at the habeas hearing that these indications of petitioner's mental illness were relevant to his ultimate conclusions and would have affected his opinion if known to him. (H.T. 128, 130, 131).

At the habeas hearing, respondent also proved that Dr. Sprehe's report contained information regarding respondent's background which was materially inaccurate. Dr. Sprehe's report advised the trial court that respondent had "numerous minor criminal convictions and other charges where he was not convicted," and that he "resort[ed] to violence as a solution to his life problems." Proffitt v. Wainwright, supra, 685 F.2d at 1250; A-116. This information was not true. In fact, respondent had no prior history of violent crime or incidents of violence, and only one prior (misdemeanor) conviction. Respondent's actual criminal record, which was introduced in evidence at the hearing below (Pet. Ex. 6), reveals that respondent had only one conviction for misdemeanor breaking and entering (on which he received a suspended sentence) and no convictions or charges for assault, assault and battery, or disturbing the peace, as the doctor believed.[3]

In these circumstances, and on these facts alone, the court of appeals ruled that respondent had been denied his right to confront the witnesses against him when he was not allowed the opportunity to cross-examine Dr. Sprehe. The court of appeals' decision is consistent with this Court's decisions ensuring basic, fundamental rights to defendants in capital

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3. The doctor's notes of his interview with respondent, on which his report was based, contained the following materially false information: that respondent had a criminal record which included stealing cars while a juvenile, breaking and entering three times, one charge of disturbing the peace, two assault charges and one charge for assault and battery. (Resp. Ex. 1). Similarly, Dr. Sprehe's notes reflect that respondent was involved in two fights while in the military service and that he received an Article 15 for one of these incidents. Respondent's military records, however, which were introduced in evidence at the habeas hearing (Pet. Ex. 7), show no fighting incidents whatsoever. The Article 15 which respondent received was for swearing in the presence of a female PX manager. (Id.). No pre-sentence investigation report was requested by either defense counsel or the trial judge. Proffitt v. Wainwright, supra, 685 F.2d at 1248; A-107. The trial judge did not, therefore, have any information concerning respondent's prior criminal record except for the erroneous data provided by Dr. Sprehe.

sentencing proceedings. See, e.g., Estelle v. Smith, 451 U.S. 454 (1981); Gardner v. Florida, 430 U.S. 349 (1977). It is also consistent with this Court's recently reiterated view that the procedural protections afforded by the adversary system, and particularly the right of cross-examination, are the means by which professional opinions are to be tested in capital sentencing. Barefoot v. Estelle, ___ U.S. ___, 51 U.S.L.W. 5189, 5194 (July 6, 1983).[4] Cf., Gardner v. Florida, supra, 430 U.S. at 360.

Petitioner asserts that the court's holding applies to all reports and information submitted to a sentencing judge, including pre-sentence investigation reports, and will discourage Florida judges from ever using such reports. Petitioner presented the identical argument to the court below in an application for rehearing and rehearing en banc. The court thereafter modified its opinion to clarify that its holding applies only to (1) the presentation of professional psychiatric opinion evidence (2) used in sentencing a defendant to death. The court's decision on rehearing addressed and eliminated the concern raised by petitioner there -- and now here -- that the decision would be more broadly interpreted than the court intended.[5] Proffitt v. Wainwright, supra, 706 F.2d at 311; A-218.

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4. In Barefoot v. Estelle, supra, this Court held that psychiatric testimony should not be excluded from capital sentencing proceedings, but should be placed before the jury, "who would have the benefit of cross-examination...." Id. at 5194. The Court "trusted [the adversary process] to sort out the reliable from the unreliable evidence...." Id. at 5194.

5. Rehearing en banc was denied, no member of the court having requested a poll. Proffitt v. Wainwright, 708 F.2d 734 (11th Cir. 1983). The Eleventh Circuit, formerly Unit B of the Fifth Circuit, has regularly granted en banc consideration in capital cases where resolution of an issue will effect large numbers of cases. See e.g., McCorquodale v. Balkcom, 705 F.2d 1553 (11th Cir. 1983), rehearing en banc granted, No. 82-8011 ___ F.2d ___, (11th Cir. June 30, 1983); Darden v. Wainwright, 708 F.2d 646 (11th Cir. 1983) (en banc); Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc); Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B) (en banc); Alderman v. Austin, 695 F.2d 124 (5th Cir. 1983) (Unit B) (en banc).

Certiorari should not be granted where (1) there is no conflict with any opinion of any court on the issue but, to the contrary, the decision is consistent with prior decisions of this Court, see Estelle v. Smith, supra; Gardner v. Florida, supra; cf. Barefoot v. Estelle, supra; and (2) the court below was careful to restrict its decision to the unique facts of an individual case where there is no claim or reason to believe similar circumstances will arise in any future case.[6]

QUESTION TWO

Certiorari Should Not Be Granted to Review An Alternative Holding Regarding the Use of a State Trial Judge's Disclaimer on Habeas, Where the Court of Appeals' Dispositive Holding Was That No Such Disclaimer Was Made.

Petitioner's second question challenges an alternative holding by the court of appeals that does not affect the court's judgment. The court of appeals rejected the district court's reliance on statements by the trial judge that he did not "consider" Dr. Sprehe's report in imposing the death sentence. While holding that a district court may not rely on such a disclaimer in habeas, the court nonetheless found that in this case there was no actual disclaimer by the trial judge and that the district court's finding to the contrary was clearly erroneous. After reviewing the trial judge's deposition testimony relied on by petitioner, the court of appeals expressly held that "even had ... it been competent evidence, the judge's

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6. Although psychiatric evidence is commonplace in capital sentencing proceedings, respondent is not aware of any other case in which a request to cross-examine a psychiatrist who had submitted a report to the sentencing authority was denied. Compare, Barefoot v. Estelle, supra; Estelle v. Smith, supra; Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981); Gholson v. Estelle, 675 F.2d 734 (5th Cir. 1982).

testimony does not support a finding that he made no use of the report." Proffitt v. Wainwright, supra, 685 F.2d at 1255; A-141. The court observed that the trial judge had acknowledged that he "did receive and read Dr. Sprehe's report and considered it for the limited purpose of whether it supported the psychiatric mitigating circumstances. After determining that the report did not support such mitigating factors, he did not consider it further." Id.; A-140. [footnote citation omitted.][10]

The court of appeals thus did not rely on the "holding" challenged by petitioner in rendering its judgment, and certiorari is therefore inappropriate.[11]

QUESTION THREE

The Court of Appeals Properly Held That Respondent Was Denied His Right to Be Present During the Taking of Dr. Coffer's Testimony Against Him.

Respondent was not in the courtroom when Dr. Coffer testified to his mental state at the sentencing hearing held by the trial judge. Defense counsel, without informing respondent that the hearing was to take place or consulting with him regarding his desire to be present, purported to waive respondent's presence. Proffitt v. Wainwright, supra, 685 F.2d at

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10. The Florida statute requires the weighing of aggravating against mitigating circumstances in reaching a decision as to the appropriate sentence. Accordingly, the presence or absence of mitigating circumstances plays a key role in the ultimate determination of sentence.

11. Whether a court on habeas may accept the testimony of a state trial judge explaining his thought process concerning a sentencing decision is an issue raised in Strickland v. Washington, No. 82-1554, cert. granted, ___ U.S. ___, 51 U.S.L.W. 3871 (June 6, 1983).

1250; A-116. The court of appeals held that respondent was denied his right to be present, derived from the Sixth Amendment right to confront the witnesses against him and the Fourteenth Amendment right to due process of law, and, in the absence of a knowing and voluntary waiver of that right, was entitled to habeas relief. Proffitt v. Wainwright, supra, 685 F.2d at 1257, 1261; A-148-49, 164.

Petitioner does not challenge the court's holding that respondent had the right to be present at the sentencing proceeding, nor does he challenge the court's holding that respondent had not been informed or consulted regarding his desire to be present.[12] Petitioner also does not seek review of the court of appeals' holding that respondent's absence was not harmless error. Rather, petitioner claims that the court of appeals held that the presence of a defendant during his capital trial is in all circumstances "nonwaivable," and that such a holding is erroneous. Petition for Writ of Certiorari at p. 27.

In fact, in response to petitioner's application for rehearing, the court of appeals specifically deleted from its opinion the language cited by petitioner to this Court. Proffitt v. Wainwright, supra, 706 F.2d at 312; A-218. On rehearing, the court below modified its language to indicate that the early decisions of this Court holding the right to presence "nonwaivable", while not explicitly overruled, had been called into question by more recent decisions. The court

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12. In the Report and Recommendation issued by the magistrate who heard the evidence, the magistrate found that respondent had not been informed or consulted about the taking of the doctor's testimony. Petitioner did not object to these findings, which were accepted by the district court and court of appeals.

made clear on rehearing that its finding of error was not based on the non-waivability of a capital defendant's right to be present, but rather, as stated in its original decision, on the absence of any valid waiver of that right in this case. Id.

The court of appeals' actual holding presents no new or unresolved question of law, nor does it conflict with any other decision. The court merely held that waiver of the defendant's right to be personally present during his trial must be knowingly and voluntarily made by the defendant. This is a well-established principle, and its application to the particular facts of the case at bar presents no issue warranting certiorari review. See Tacon v. Arizona, 410 U.S. 351, 352 (1973).[13]

An examination of the two cases cited by petitioner as conflicting with the decision below reveals no such conflict. In Frank v. Mangum, 237 U.S. 309 (1915), this Court found that there had been a personal waiver by the defendant of his right to be present when the verdict was rendered. In Howard v. Kentucky, 200 U.S. 164 (1906), the Court merely noted that the defendant, "through his counsel" had consented to the questioning of a prospective juror in his absence. There is no indication that the defendant in that case had not been consulted and assented to his counsel's communication of consent to the trial court. Both Frank and Howard were decided before the Sixth Amendment was held to be applicable to state

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13. Petitioner suggests that the decision to be present is one which should be left in the hands of counsel without any consultation or acquiescence by the defendant. This Court has recently spoken clearly to the distinction between strategic judgments that a lawyer may make for his client and waivers of basic personal rights that a lawyer may not make without the client's assent. Jones v. Barnes, ____ U.S. ____, 51 U.S.L.W. 5151, 5153 (July 5, 1983). The decision to be present during the testimony of witnesses is plainly in the latter category. See Brookhart v. Janis, 384 U.S. 1 (1966).

court proceedings. In both cases, the question presented was whether the defendants' absence from the particular proceeding resulted in such fundamental unfairness that Due Process required reversal of their convictions. In both cases, because of the nature of the proceedings held in the defendants' absence, no prejudice to the defense -- and thus no Due Process violation -- was found. Neither case dealt with the taking of testimony against the defendant. The court of appeals' decision is in conflict with neither.

Rather, the court of appeals here found specific prejudice to respondent as required by Frank and Howard -- a finding not challenged by petitioner. Proffitt v. Wainwright, supra, 685 F.2d at 1261; A-164. The court held that respondent's absence during the doctor's testimony prejudiced him in that the doctor's evaluation was rendered in ignorance of the fact that respondent was receiving psychotropic medication at the time of the examination, which suppressed any symptoms of mental illness, and, while incarcerated, had engaged in repeated suicide attempts. This information was known to respondent, but not his counsel, who had not consulted with respondent before the testimony was received. Id. at 1260; A-163. The court of appeals' decision was appropriate on the facts of this case. Certiorari should be denied.

QUESTIONS FOUR AND FIVE

Certiorari Should Not Be Granted to Review Portions of the Decision Below Which Were Remanded on Rehearing.

In questions four and five of the petition, petitioner contends that the court of appeals' decision conflicts with this Court's recent decision in Barclay v. Florida, ___ U.S.

___, 51 U.S.L.W. 5206 (July 6, 1983). Petitioner, however, fails to advise the Court that the court of appeals, on rehearing, specifically remanded this aspect of its decision to the district court for reconsideration in light of Barclay. See Proffitt v. Wainwright, supra, 706 F.2d at 312; A-221. In the wake of the court of appeals' action, there is no extant ruling for this Court to review. The lower courts can and should perform the task of applying Barclay to the facts of particular cases in the first instance. Until they have done so, certiorari is inappropriate.

QUESTION SIX

Certiorari Should Not Be Granted To Resolve Issues Not Properly Raised Below, Not Decided Below, and Not Germane to This Case.

The question presented purports to challenge the standard used by the courts of appeals on habeas corpus in reviewing state court convictions.[14] This issue was not raised until petitioner's application for rehearing and rehearing en banc in the court below. It was never subjected to briefing or argument by the parties, and was not ruled on by the court below. It should therefore not be entertained on certiorari. Cf. Illinois v. Gates, ____ U.S._____, 51 U.S.L.W. 4709 (June 8, 1983). Moreover, even if petitioner's proposed standard were adopted, respondent's case satisfies the standard. The rights involved here -- confrontation and cross-examination of adverse expert witnesses at capital sentencing proceedings --are fundamental, and the errors involved in their denial in this case are manifest. The issue framed by petitioner is simply not in this case.

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14. The question presented seeks review of the standard by which a court of appeals may reverse the denial of habeas relief by a district court. Petitioner's discussion of the question, however, challenges the general standard for federal court review of state court convictions, and respondent assumes that this discussion reflects the question petitioner actually seeks to have reviewed.

CONCLUSION

For all of the above reasons, the petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, David S. Golub, Esq., hereby certify that on September 28, 1983, I served the foregoing Brief in Opposition to the Petition for Writ of Certiorari on counsel for the petitioner by depositing a copy in the United States mail, first class, postage prepaid, addressed as follows:

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